PUBLIC PROSECUTOR

v.

LIEW OON KIONG

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL TRIAL NO. 19 OF 1984]
27 OCTOBER 1990

EVIDENCE: *Chemist report - Admissibility - Chemist not present for cross-examination by defence - Further evidence - Section 32 Evidence Act 1950 - Section 425 Criminal Procedure Code.*

The accused was charged with trafficking in heroin under s. 39B(1) of the Dangerous Drugs Act 1952.

As a result of a raid, the prosecution alleged that the accused proceeded to make statements voluntarily.

The unusual feature in this case was that all the incriminating items seized from the said house were not handed over to the Investigating Officer of this case. Instead they were taken away by two of the raiding officers namely SD2 and SD4 to Batu Pahat, Cawangan Anti Dadah Office. SD2 seemed to have played the role of the investigating officer. As a result of the arrest, a Mr. C from the chemist department conducted some tests on the premises where the drugs were found. He prepared a report on his findings also included were 2 photographs taken by him.

During the trial, the prosecution attempted to tender Mr. C's report, but as defence Counsel had requested the attendance of the chemist and as the chemist did not attend Court, questions as to the admissibility of the report arose.

The issue here was whether the conditions precedent under s. 32 of the Evidence Act had been satisfied.

Held:

[1] The Court requires evidence and strict proof that Mr. C's attendance cannot be procured without an amount of delay or expenses. There was no such evidence before the Court; therefore the chemist's report was not admissible and there is no evidence that the exhibits so seized are drugs as defined under the Act.

[2] Admission of further evidence under s. 425 of the Criminal Procedure Code would be prejudicial to the accused and as such the application by the DPP was dismissed.

[3] Due to the actions of SD2, doubts were created as to whether the exhibits so recovered and kept by SD2 are the actual exhibits and that they were not being tampered with.

[4] Where there is more than one inference, the inference most favourable to the accused should be adopted.

[5] Prosecution has failed to prove a *prima facie* case against the accused.

[Accused acquitted and discharged.]

Cases referred to:
PP v. Teng Boon How [1990] 2 CLJ (Rep) 873
Mohamed Ghouse v. The King [1909] 11 SSLR 31
Ng Yiu Kowke & Ors. v. PP [1989] 3 MLJ 166
Sim Tiew Bee v. PP [1973] 2 MLJ 200
Chainchal Singh v. Emperor [1946] AIR P C1
PP v. Phon Nam [1988] 3 MLJ 417
Tai Chai Keh v. PP [1948-49] suppl 105

Legislation referred to:
Criminal Procedure Code, s. 399
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)
Evidence Act 1950, s. 32

For the accused - Teh Poh Teik; M/s. Abdul Raman Saad & Associates
For the prosecution - Haji Idris bin Haji Othman, DPP

JUDGMENT

James Foong JC:

The accused is charged for the following offence:

> Bahawa kamu pada 26 September 1983 jam kira-kira 3.30 petang di rumah No. 120, Jalan Siantan, Taman Indah, Simpang Renggam dalam Daerah Kluang, dalam Negeri Johor, telah mengedar dadah heroin dengan jumlah berat 98.67 grams bagi pihak diri kamu sendiri, dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, Akta 234 dan boleh di hukum di bawah s. 39B(2) Akta yang sama.

The prosecution evidence is that on 26 September 1983 on information received, one ASP Harban Singh (SD2) together with Insp. Sahat (SD4), D/C Rashid (SD5) dan DPC Razak raided a house known as No. 120, Jalan Siantan, Taman Indah, Simpang Renggam, District of Kluang, in the State of Johore (hereinafter referred to as the "said house").

On arrival at the front said house, which was a single storey terrace house, the police party pretended that the car which they were travelling in was overheated and needed a refill of water. SD2 proceeded to the said house and peeped through the windows whereupon he saw a male Chinese lying on a sofa in the hall. A female Chinese answered to his call informing him that water was available from a tap in the garden.

SD2 returned to the car and decided to raid the said house.

DPC Razak was ordered to go to the rear of the house to stand guard while SD2, SD3 and SD5 approached the front of the said house. After calling out and identifying themselves, the female Chinese answered the door and allowed the 3 police officers to enter. In the said house the police could not find the male Chinese whom they were looking for.

While searching the said house, the police party heard sounds coming from the ceiling. SD2 immediately ordered SD5 to proceed up to the ceiling to investigate.

SD5 got up to the ceiling through a manhole in the ceiling board situated in between the bathroom and the toilet of the said house. The position of the manhole, the bathroom and the toilet is best illustrated in the sketch plan (P4C).

In the ceiling SD5 discovered that a male Chinese whom he identified later as the accused was hiding behind a water tank. He ordered the accused to leave the ceiling which the accused did through the said manhole.

SD2 and SD4 were waiting for the accused at the entrance of the bathroom. The accused, SD2 and SD4 then proceeded to the hall and sat on the sofa. According to SD2 and SD4 the accused proceeded to make statements voluntarily. The statements which were essential were noted down by SD2 in a hard cover exercise book (P5) which he brought along.

The following are the recorded statements on a page of P5:

> Saya orang Singapore. Anak saya satu. Minta tolong. Jangan bawa saya ke balai polis. Selesai sini. Saya boleh beri itu pek hoon. Awak mesti tolong. Jangan beri saya mati. Berapa wang mahu saya boleh beri. Mana itu pek hoon? Dalam laci.

The defence Counsel objected to admissibility of the aforesaid statement. After hearing further evidence, this Court ruled the admissibility of the aforesaid, for the reason that the accused was not arrested at the material time and that the said statement was obtained under s. 112 of the Criminal Procedure Code.

According to prosecution witnesses, the accused lead SD2 and 4 into a bedroom (Bilik 1) shown in P4A. From a compartment by the side of a dressing table, the accused brought out a brown plastic bag (P14B) and in it contained 66 small plastic bags [(P14C (1-66)] which consisted of a substance believed to be heroin.

Also found in the said compartment were a weighing scale (P13B), metal spoon (P16B), a plastic bag in which contained 628 small empty plastic packets (P12C).

On the floor of Bilik 1, an oil lamp (P23) was also subsequently recovered.

The accused was then handcuffed and the items found in the compartment were seized by the police party. SD2 held on to the brown plastic bag containing the 66 small packets of suspected drugs while SD4 took the remaining of the incriminating items.

The police party proceeded to Kluang police station. At the said police station they met the investigating officer (IO) Insp. Sawaludin (SD9). The 66 small plastic bags were counted in front of the IO by SD2, while other exhibits held by SD5 were shown to the IO.

The unusual thing in this case was that all the incriminating items seized from the said house were not handed over to the IO of this case. Instead they were taken away by SD2 and SD4 to Batu Pahat, Cawangan Anti Dadah office.

In this case, SD2 seemed to play the role of an investigating officer. First he marked the 66 packets suspected drugs. Then he proceeded to lay-out all the exhibits including those held by SD4 except the brown plastic bag (P14B) to be photographed. He then locked up the 66 packets in his steel cabinet. He proceeded to telephone the chemist who was stationed in Johore Bahru to meet him and the IO at the said house the next day to "assist me in the investigation."

The next day SD2, the IO and a chemist by the name of Mr. Cheong Meow Koon (Mr. Cheong) went to the said house. In the said house in Bilik 1, Mr. Cheong conducted some dusting and swapping on materials gathered from the floor, in the compartment and on the dressing table. Apparently two photographs were also taken by Mr. Cheong which were to be part of his chemist's report.

Besides the sketch plan (P4 A, B, C) showing the interior of the said house, SD2 also proceeded to draw his own sketch plan (P3) which shows the position of the said house in relation to where his car was parked on the day of the incident.

On 28 September 1983, SD2 proceeded further by sending the 66 plastic packets of suspected drugs to the chemist in Johore Bahru.

When questioned by defence Counsel why he did not hand over the incriminating exhibits to the IO, SD2 replied "I chose not to."

When the IO was giving evidence the prosecution attempted to tender a chemist's report (P19). This Court questioned the admissibility of this report since the defence Counsel in this case has requested the attendance of the chemist who made the report to attend Court as a witness under s. 399 of the Criminal Procedure Code. The learned Public Prosecutor replied that the maker of the report was overseas and that he will be calling other witnesses to substantiate this fact. The defence Counsel objected to the contents of P19 to be admitted pending evidence adduced on why the maker could not attend Court.

Subsequent witnesses that were called relating to the aforesaid point were SD10 and SD11.

SD10 is a police personnel who attempted to serve the subpoena on the chemist Mr. Cheong. He was informed by an officer of the chemistry department in Petaling Jaya, Selangor that Mr. Cheong is away overseas on a study course for 1 year.

SD11 is the acting head of the chemistry department in Johor Bahru. He "faham" (understands) that Mr. Cheong was undergoing a course in Scotland at the present moment. He had a departmental file which contained a copy of P19 and he identified the signature of Mr. Cheong on P19.

During the submission of the defence Counsel on whether the prosecution has proved a *prima facie* case, the defence alleged that P19 cannot be received in evidence. The maker of the report was not called and that the prosecution has not satisfied the condition precedent under s. 32 of the Evidence Act.

In this case as stated earlier, P19 was served on the accused well before the statutory requirement of 10 days before trial as laid down under s. 399 of the Criminal Procedure Code. The defence gave notice also within the statutory period of 3 days before trial requiring the attendance of the chemist.

Under such situation as I have ruled in the case of *PP v. Teng Boon How* reported in December CLJ Criminal Trial No. 3 of 1987, Johor Bahru High Court the exemptions to the admissibility of the chemist's report under s. 399 of the Criminal Procedure Code does not arise any more. The chemist has to attend Court like any other witness and he has to testify to the satisfaction of the Court that he is an expert in his field. The witness then can tender his chemist's report just like any other normal witnesses tendering a document so made by them.

As the chemist in this case was not being called and the prosecution attempted to utilise s. 32 of the Evidence Act to admit a document purported to be made by the chemist, then the conditions of s. 32 of the Evidence Act must first be satisfied.

Section 32 reads as follows:

> Statement written or verbal, of relevant facts made by a person who is dead or cannot be found, or who has become incapable of giving evidence, *or whose attendance cannot be procured without an amount of delay or expenses under which circumstances of the case appears to the Court unreasonable* are themselves relevant facts in the following case:

(b) *when the statement was made by such person in the ordinary course of business and in particular when it consists of any entry or memorandum made by him in the books kept in the ordinary course of professional duty;* or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used of a letter or other document usually dated, written or signed by him; (The emphasis is my own).

As stated in s. 32 of the Evidence Act, the condition to be satisfied is that the attendance of Mr. Cheong in this case cannot be procured without an amount of delay or expenses which under the circumstances of this case appears to this Court to be unreasonable.

From evidence adduced so far, in the first place, there is no evidence to say where Mr. Cheong is at the present moment. The head of department or an officer in charge of the section which Mr. Cheong is attached to was not being called to testify that he was in the United Kingdom undergoing a study course.

The evidence of SD10 the police process server stating that he was told by an officer in Jabatan Kimia Petaling Jaya that Mr. Cheong had gone overseas to study for 1 year is not admissible because it is hearsay.

SD11 is the acting head of the chemistry department of Johor Bahru of which Mr. Cheong was no longer attached to. SD11 only said that he "believed" that Mr. Cheong was undergoing a course in the United Kingdom.

Under such circumstances there is no direct evidence as to where Mr. Cheong is. Besides there is also no evidence adduced that Mr. Cheong cannot be procured without an amount of delay or expenses which under the circumstances of this case appears to the Court unreasonable.

Adopting the views of Sercombe Smith J in *Mohamed Ghouse v. The King* [1909] 11 SSLR 31, s. 32 of the Evidence Act should be constructed strictly "so far at least as its opening portion is concerned."

Again as stated by Chief Justice Tan Sri Hashim Yeop Abdullah Sani in *Ng Yiu Kowke & Ors. v. PP* [1989] 3 MLJ 166 at p. 169:

> ...all the Court should need to satisfy the requirement of s. 32(b) of the Evidence Act was that there was some evidence that the maker's attendance could not be procured without delay or expenses which the Court considered unreasonable under the circumstances.

The Federal Court in the case of *Sim Tiew Bee v. PP* [1973] 2 MLJ 200 at p. 202 adopted the views of Lord Goddard in *Chainchal Singh v. Emperor* AIR [1946] P.C1 which states as follows in relation to the evidence required for use under s. 32 of the Evidence Act:

> Where it is desired to have recourse to this section on the ground that the witness is incapable of giving evidence that act must be proved and proved strictly... In a civil case a party can if he choose to waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

Bound by those decisions, this Court requires evidence and strict proof that Mr. Cheong's attendance cannot be procured without an amount of delay or expenses. To this stage there is no such evidence before this Court. As such admissibility of P19 is not admitted as evidence, there is no evidence before this Court that the exhibits so seized are drugs as defined under the Dangerous Drugs Act 1952.

During the submission of the learned DPP and upon realising the short fall as stated above, he applied under s. 425 of the Criminal Procedure Code to call further evidence to admit P19. At the request of the Court the case of *PP v. Phon Nam* [1988] 2 MLJ 417 was adduced to support his contention.

Section 425 as stated by acting Lord President Tan Sri Abdul Hamid (as he then was) has 2 limbs. In the first limb the Court has a discretion to call or recall any witness but:

> the Court must proceed with utmost circumspection especially when there was likelihood of fresh evidence proving to be prejudicial to the accused.

The second limb is:

> an impeature provision which requires the Court to do so where the Court is satisfied that the evidence to be summoned would appear to the Court to be essential to a just decision of the case.

It is the opinion of this Court that in this case any fresh evidence to be called would be prejudicial to the accused. Unlike the case of *Phon Nam* where it is a "mere formality" that the witness who served the chemist report was not being called, in this case the chemist is a vital witness on which the whole of the prosecution case is dependent upon. The accused has specifically requested the attendance of the maker of the chemist's report. He has complied with s. 399 of the Criminal Procedure Code by giving such notice and obviously the defence Counsel would wish to cross-examine this particular witness especially when dusting and swapping were carried out at the scene of the crime.

Furthermore, from evidence adduced by SD4 who served a copy of the chemist report on the accused, he forgot to serve a complete report. The last page of the chemist report which contained some photographs taken by the chemist and of which the chemist referred to in his report proper was not attached to the copy of the report observed on the accused. Obviously the presence of Mr. Cheong is important, but if his attendance cannot be secured then the prosecution must prove to the satisfaction of this Court the stated conditions under s. 32 of the Evidence Act.

Admission of further evidence in this case would only lead onto this Court's consideration of whether the conditions under s. 32 of the Evidence Act can be satisfied. It is still a way off before any evidence would appear to this Court to be essential to a just decision of this case.

Under the circumstances stated aforesaid the application of the learned DPP is denied.

As stated earlier from the evidence adduced in this case SD2 seemed to have taken over the role of the investigating officer. He may have been an experienced officer but the very objective of handing over the case after arrest made to an investigating officer is to prevent any tampering or construction of evidence against an accused person.

In this case the essential exhibits, the brown plastic bag and 66 packets of substances suspected of heroin were not handed over to the IO. These were kept with SD2 for 2 days before he himself personally sent it to the chemist for analysis.

During this period the exhibits were not weighed and was only casually shown to the IO. Adverse inferences can be drawn from the action of SD2 that P14C 1-66 could have been tampered with and are not those recovered from the said house.

From further evidence adduced it seems as if SD2 was conducting the investigation by even calling the chemist himself and directing the chemist as to where dusting and swapping needs to be done. Even the sketch plan P3 were drawn by SD2 and not the IO in this case.

This Court finds that due to the actions of SD2 doubts are created as to whether the exhibit so recovered and kept by SD2 are the actual exhibits and that they were not being tampered with.

Adopting the view of Mr. Justice Spencer Wilkinson in *Tai Chai Keh v. PP* [1948-49] suppl. 105, where there are more than one inferences, the inference most favourable to the accused person should be adopted.

In view of the Courts ruling aforesaid the prosecution has failed to prove a *prima facie* case against the accused and the accused is hereby acquitted and discharged without his defence being called.

Also found at [1991] 1 CLJ 165